

The Appeals Board has considered the record and has adopted the stipulations listed in the Award of the Administrative Law Judge.

### **ISSUES**

The Administrative Law Judge denied respondent's request to shift a portion of the liability for the settlement respondent paid claimant for work-related injuries to his bilateral upper extremities to the Kansas Workers Compensation Fund (Fund). Respondent contends the Fund is responsible for the portion of the settlement which was attributed to claimant's second injury which involved claimant's left upper extremity and resulted in claimant suffering a general body disability.

In contrast, the Fund contends the Administrative Law Judge's Award should be affirmed because the claimant's bilateral upper extremity injuries resulted from one accidental injury and the appropriate accident date was July 13, 1994. The Fund argues it does not have any liability when there is only one date of accident. Also, since the accident date is after July 1, 1994, the Fund contends it has no liability because effective July 1, 1994, Fund liability was eliminated by the legislature for work-related accidents that caused injury to handicapped employees. See K.S.A. 44-567(a)(1).

Fund liability is the only issue for Appeals Board review.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The respondent settled claimant's claim for work-related injuries to his bilateral upper extremities and back in a settlement hearing held on March 19, 1996, before a Special Administrative Law Judge. The settlement was for a 13 percent permanent partial general body disability based on the permanent functional impairment opinion of orthopedic surgeon Mark Bernhardt, M.D. The 13 percent permanent functional impairment rating was a combination of 8 percent rating for claimant's bilateral upper extremity injuries and a 5 percent rating for an injury to claimant's back. The back injury is not part of the Fund liability issue in this case.

Dr. Bernhardt arrived at an 8 percent permanent functional impairment rating for claimant's bilateral upper extremity injuries by converting 7 percent impairment to each upper extremity to a 4 percent whole body rating and combining those ratings for the 8 percent whole body permanent functional impairment rating.

Claimant was employed by the respondent in a job that required him to use power tools to drill and rivet 8 hours per day. Claimant testified and the medical records from Boeing Central Medical verified that claimant first made complaints of symptoms in his right upper extremity on February 9, 1993. At that time, claimant indicated to respondent's medical staff that he had been experiencing symptoms in his right upper extremity for over a year. Those symptoms had worsened and that was the reason claimant, on February 9, 1993, reported to Boeing Central Medical.

Boeing Central Medical referred claimant to Miguel Pirela-Cruz, M.D. Dr. Cruz first saw claimant on March 10, 1993. He diagnosed claimant with right lateral epicondylitis. The doctor released claimant to return to regular work with the restriction of not to use a torque wrench with his right hand.

Claimant testified that because of his right arm symptoms he started using his left arm more and then developed symptoms in his left arm. Claimant first reported symptoms in his left arm to Boeing Central Medical on May 17, 1994. The record also indicates claimant was suspended from work for 30 days on May 17, 1994, for reasons not associated with his injuries. Claimant returned to regular work after the suspension on June 16, 1994, with continuing complaints of weakness and pain in his bilateral upper extremities.

Boeing Central Medical referred claimant to Jeanette C. Salone, M.D., for diagnostic testing and treatment recommendation on July 13, 1994. Dr. Salone conducted an electrodiagnostic examination of claimant's bilateral upper extremities. She found the testing showed a normal study with no electrophysiological evidence of carpal tunnel syndrome or ulnar neuropathy on either side. However, her clinical examinations found a positive Tinel's sign at the right ulnar elbow area, positive carpal tunnel syndrome compression test on the right, and positive Phalen's test bilaterally. She diagnosed probable overuse syndrome of the upper extremities. The doctor's recommendation was job modification and for claimant to be instructed in energy conservation techniques.

Dr. Mark Bernhardt saw claimant for an independent medical examination on December 26, 1995. The respondent then took Dr. Bernhardt's testimony by deposition on the Fund liability issue. Dr. Bernhardt testified claimant would likely not have sustained permanent impairment to his left upper extremity but for the problems he had been experiencing with his right upper extremity. Dr. Bernhardt also testified, as claimant continued to work following the development of the overuse condition in his left upper extremity, both of the upper extremities were simultaneously aggravated. Respondent, in its brief before the Appeals Board, agrees that at some point claimant injured both arms simultaneously entitling claimant to a general body disability rather than two separate scheduled injuries.

Respondent argues that claimant suffered a general body disability because the evidence proved both upper extremities were injured simultaneously. But respondent also argues claimant suffered two separate scheduled injuries and the Fund is responsible pursuant to K.S.A. 44-567(a)(1) for all the compensation paid for the second injury which involved the left upper extremity and resulted in the general body disability.

The Appeals Board disagrees with the respondent's arguments and finds the Administrative Law Judge's Award, that denied respondent's request to shift a portion of the settlement between the respondent and the claimant to the Fund, should be affirmed. The Appeals Board finds claimant suffered injuries to his bilateral upper extremities from repetitive trauma over a period of time caused by his work activities. Although claimant

was terminated on July 15, 1994, for reasons not associated with his injuries, the Appeals Board finds claimant's appropriate date of accident is July 15, 1994. The Appeals Board finds work restrictions recommended by Dr. Salone on July 13, 1994, were never implemented. Therefore, the Appeals Board finds the holding in Alberty v. Excel Corp., 24 Kan. App.2d 678, 951 P.2d 967, *rev. denied* 264 Kan. \_\_\_ (1998) does not apply. The Appeals Board finds the record supports the July 15, 1994, accident date because claimant continued to perform repetitive work activities through his last day worked which caused him to suffer micro-trauma work injuries. See Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

The Appeals Board concludes that Fund liability is denied in this case for two reasons: first, the date of claimant's accident is after July 1, 1994, and second, the claim involves a general body disability not two separate scheduled injuries and, therefore, there was no preexisting handicap and K.S.A. 44-567 is not applicable. See K.S.A. 44-567(a)(1) and Diaz v. Beech Aircraft Corporation, Docket No. 169,533 (April 1997).

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Jon L. Frobish's November 20, 1997, Award that denied respondent's request to shift all or part of the liability of the settlement between respondent and claimant to the Fund, is affirmed.

All remaining orders contained in the Administrative Law Judge's Award are adopted by the Appeals Board.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Vaughn Burkholder, Wichita, KS  
Christopher J. McCurdy, Wichita, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director

**DUANE A. COLE, SR.**

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**DOCKET NO. 192,352**